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No.

Supreme Court, U.S.

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IN THE

Supreme Court of the United States

October Term, 1989

SHENANDOAH BAPTIST CHURCH,

Petitioner,

v.

ELIZABETH DOLE, SECRETARY
UNITED STATES DEPARTMENT OF LABOR AND
EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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PETITION FOR WRIT OF CERTIORARI

I. QUESTIONS PRESENTED

(1) WHETHER THE COURT OF APPEALS ERRED BY HOLDING THAT ROANOKE VALLEY CHRISTIAN SCHOOLS, WHICH IS AN INTEGRAL PART OF THE RELIGIOUS MISSION OF SHENANDOAH BAPTIST CHURCH, IS AN ENTERPRISE AS CONTEMPLATED BY THE FAIR LABOR STANDARDS ACT.

(2) WHETHER THE TEACHING STAFF AT SHENANDOAH BAPTIST CHURCH PERFORMS THE FUNCTION OF MINISTERS AND, THEREFORE, THE TEACHERS ARE NOT EMPLOYEES FOR THE PURPOSES OF THE FAIR LABOR STANDARDS ACT AND EQUAL PAY ACT.

(3) WHETHER THE APPLICATION OF THE FAIR LABOR STANDARDS ACT AND EQUAL PAY ACT TO SHENANDOAH BAPTIST CHURCH VIOLATES THE EQUAL PROTECTION CLAUSE OF THE UNITED STATES CONSTITUTION.

(4) WHETHER THE APPLICATION OF THE FAIR LABOR STANDARDS ACT AND EQUAL PAY ACT TO

SHENANDOAH BAPTIST CHURCH VIOLATES THE FIRST AMENDMENT OF THE UNITED STATES CONSTITUTION.

(5) WHETHER THE AWARDING OF BACK PAY UNDER THE EQUAL PAY ACT TO ALL SINGLE FEMALE TEACHERS, WHO WERE NOT A PART OF THE CLASS DESIGNATED TO RECEIVE THE HEAD OF HOUSEHOLD SUPPLEMENT, WAS ERRONEOUS.

(6) WHETHER THE AWARDING OF BACK PAY FOR MINIMUM WAGE DEFICIENCIES WITHOUT REGARD TO THE NATURE OF THE INDIVIDUAL EMPLOYMENT ACTIVITY WAS ERRONEOUS.

II. LISTING OF PARTIES

The names of all parties are listed in the caption. The individuals named in the caption were non-professional, church staff members who were permitted to intervene by the trial court; however, the essential issues for all of these parties are identical. Therefore, only Shenandoah Baptist Church petitions the Court for a writ of certiorari at this time.

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IV. REFERENCE TO REPORTS AND OPINIONS

In an opinion given in 1983, the United States District Court for the Western District of Virginia entered partial summary judgment

in favor of the Department of Labor relative to the minimum wage claim on behalf of non-professional staff members. This opinion is contained at Donovan v. Shenandoah Baptist Church, 573 F. Supp. 320 (W.D. Va. 1983).

By judgment entered on March 30, 1990, the United States Court of Appeals for the Fourth Circuit affirmed the 1983 decision of the District Court. The Court of Appeals also affirmed the District Court's decision entered following trial in 1988. The District Court's second opinion is contained at Department of Labor v. Shenandoah Baptist Church, 787 F. Supp. 1450 (W.D. Va. 1989).

The judgment entered on appeal was accompanied by an opinion and is reported at Elizabeth Dole and Equal Employment Opportunity Commission v. Shenandoah Baptist Church, et al., 899 F.2d 1389 (4th Cir. 1990). The decision of the Court of Appeals is contained in the appendix of this petition.

V. STATEMENT OF GROUNDS FOR JURISDICTION

The petitioner is a party in a case whereby it is aggrieved by a decision of the United States Court of Appeals for the Fourth Circuit entering judgment against it and respectfully requests this Court to review this decision by writ of certiorari as follows:

(1) The judgment sought to be reviewed was made and entered by the United States Court of Appeals for the Fourth Circuit on March 30, 1990, resulting in a published opinion which is included in the appendix;

(2) Because few of the reasons contained in the guidelines published by the Court of Appeals for a petition for rehearing en banc existed, the petitioner concluded that the petition would not be granted or, if granted, the opinion would not be changed and, therefore, review is sought by a petition for writ of certiorari without the filing of a

petition for rehearing in the Court of Appeals.

(3) The statutory provisions believed to confer the jurisdiction of this Court to review the final judgment in question by writ of certiorari is 28 U.S.C. § 1254(1).

VI. CONSTITUTIONAL AND STATUTORY PROVISIONS

The provisions are listed below, but because of length, the pertinent texts are set forth in the appendix:

29 U.S.C. § 206 (a) (b)

29 U.S.C. § 206 (d)

First Amendment of the United States Constitution

Equal Protection Clause of the United States Constitution

VII. STATEMENT OF THE CASE

In 1978, the Department of Labor (hereafter-DOL) filed the present action against Shenandoah Baptist Church (hereafter-

Shenandoah).¹ DOL alleged that Shenandoah paid certain employees less than the statutory minimum wage for the years 1976 through 1982 in violation of the Fair Labor Standards Act (hereafter-FLSA). 29 U.S.C. § 206(a)(b). The EEOC alleged that Shenandoah paid male teachers a salary greater than the amount paid to female teachers in violation of the Equal Pay Act (hereafter-EPA). 29 U.S.C. § 206(d).

In 1983, the District Court entered partial summary judgment for DOL, holding that Shenandoah was required to pay non-professional, hourly employees at least the statutory minimum wage. Donovan v. Shenandoah Baptist Church, 573 F. Supp. 320 (W.D. Va. 1983). Subsequent to this ruling, the

¹Elizabeth Dole, the current Secretary, is named in the caption pursuant to Fed. R. App. p. 43(c)(1). The Equal Employment Opportunity Commission (hereafter-EEOC) joined in the action in 1979 when administration of equal pay claims was transferred to it.

District Court permitted twenty-one of the church's non-professional, hourly staff members to intervene in the action in order to assert their own First Amendment rights. The Court also agreed to allow Shenandoah to defer any appeal of its ruling until after trial and a final order had been entered.

At the conclusion of trial held in September, 1988, the District Court entered partial judgment for the government ruling that the EPA provisions of the FLSA applied to Shenandoah. The court also found that Shenandoah had violated the minimum wage requirements and that to require the church's staff to receive the minimum wage would not infringe the First Amendment rights of the intervenors. In an order entered on February 7, 1989, judgment was entered for DOL in the amount of \$16,818.46, while judgment was entered for EEOC in the amount of \$177,680.00.

On March 30, 1990, the Court of Appeals affirmed the decision of the District Court.

Shenandoah was founded in 1971 as an independent Baptist church. One of the central purposes in the founding of Shenandoah was the desire to provide Christian education, including a Christian school, for the church's membership and others interested in its educational program.²

²The church views Christian education as a vital part of its religious mission. The government has not disputed that characterization, while the District Court found as a matter of fact that the school was a part of Shenandoah's overall religious mission. Shenandoah believes that it must comply with the Great Commission as found in Matthew 28:19-20, which calls for evangelism, baptism, and Christian education. It is the church's belief that the Great Commission requires Christian education, which includes the education given at Roanoke Valley Christian Schools, to the same degree that it requires evangelism and baptism. Shenandoah also believes that Christian education is a basic and fundamental tenet and that it is the duty of every Christian parent to bring their children up in the instruction of the Lord.

In 1973, Shenandoah founded Roanoke Valley Christian Schools (hereafter-RVCS). Shenandoah operates RVCS from a thoroughly religious perspective. The educational philosophy of the school is that all education must be Christ centered. Each subject area is taught from a Christian perspective with biblical truth integrated into each course. While the school admits students from any faith, all parents must be willing to have their children trained according to Shenandoah's own Statement of Faith, biblical beliefs, and philosophy.

Shenandoah requires each employee to adhere to its biblical beliefs and to maintain the church's spiritual qualifications. Teachers must subscribe to the church's educational philosophy and Statement of Faith. Teachers must not only be able to formally teach Bible, but must integrate biblical truth into their particular subject area.

The buildings in which the school is operated are also utilized by the church for its other ministries and functions including worship services, sunday school, youth activities, programs, and various Bible classes. Tuition and other revenues that the school receives do not cover all expenses, with any shortfall being made up by the church's offerings. All buildings are owned by the church. RVCS owns no assets.

As Shenandoah expanded the school ministry into the high school grades, teachers for specialized subject areas were required. Shenandoah had to seek additional teachers from various Christian colleges and universities around the country. The church concluded that it could not attract families to move into the Roanoke area based on the meager base salary. The church believed that it had an obligation to those with families who would move into the area to work in the

ministry. Accordingly, the church looked to its biblical tenets and concluded that since the husband was the head of the house, he had the spiritual and financial obligation for the family. Because the church could not raise base salaries to provide for all personnel, it was determined to supplement the income of the full time, married male teachers as the heads of their household.

In implementing this plan, the church also concluded that it would raise the base salary as financially permitted and phase out the head of household supplement in a corresponding fashion. The supplement was paid from 1976 through the 1986 school year, reducing the amount of the supplement throughout this period until it was completely phased out. The school's full time, married male teachers received the supplement between 1976 and 1986. Between 1981 and 1986, the church paid the supplement to three divorced

female teachers who had dependents and qualified as the heads of their households. The supplement was not paid to any single teachers, whether male or female, since they were not considered a head of household.

VIII. ARGUMENT

1. ROANOKE VALLEY CHRISTIAN SCHOOLS, WHICH IS AN INTEGRAL PART OF THE RELIGIOUS MISSION OF SHENANDOAH BAPTIST CHURCH, IS NOT AN ENTERPRISE AS CONTEMPLATED BY THE FAIR LABOR STANDARDS ACT.

The Court in Lemon v. Kurtzman, 403 U.S. 602, 616 (1971), evaluated the relationship between a Christian school and the church. The Court stated that schools, like RVCS, constitute an integral part of the religious mission of the church. Justice Brennan in a separate concurring opinion stated that the education such schools provide goes hand in hand with the religious mission which is the only reason for the school's existence (emphasis added). Id. at 616-17.

The Court further concluded in Meek v. Pittinger, 421 U.S. 349, 366 (1975), that the very purpose for Christian schools is to provide an integrated, secular and religious education. Thus, in church operated schools, the very "raison d' etre" is the propagation of religious faith. NLRB v. Catholic Bishop, 440 U.S. 490, 503 (1979); (quoting, Lemon, 403 U.S. at 628).

These cases illustrate clearly that a church is more than an edifice that affords people an opportunity to worship and that strictly religious uses and activities are more than prayer or sacrifice. See, e.g., Diocese of Rochester v. Planning Board, 136 N.E.2d 827, 836 (N.Y. 1956). The very nature of church encompasses Christian education along with worship and other activities. Id. However, unless the nature of church is accepted as being broader than mere worship, a court may become the definer of that nature

and, thereby, place an impermissible limitation on it. See, e.g., Corporation of Presiding Bishop v. Amos, 483 U.S. 317 (1987).

In the present action, both the District Court and Court of Appeals have defined the church to exclude the daily Christian education RVCS provides. Yet, it is this unique and inseparably intertwined nature, which is based upon biblical belief and philosophy, that distinguishes Shenandoah. Both theologically and practically, RVCS is Shenandoah, that is, the school is the church. As such, RVCS is not public or private education, it is church education. Moreover, it is not an activity conducted for profit.³

³RVCS is not a commercial activity carried on by a religious organization and, therefore, is not an enterprise for purposes of the FLSA. See, e.g., Tony and Susan Alamo Foundation v. Secretary of Labor, 471 U.S. 290 (1985). The education Shenandoah gives lies at the very heart of the propagation of Shenandoah's faith. RVCS is the expression of one of the most sacred and highest beliefs, the right and duty to educate and train children, in

In Catholic Bishop, 440 U.S. at 500, this Court examined the issue of application of the National Labor Relations Act (hereafter-NLRA) to parochial schools. The Court found that applying the NLRA to those parochial schools would pose a significant risk of infringing upon the church's first amendment rights.⁴ To avoid a determination regarding the constitutionality of the NLRA, the Court established the principle in such cases that jurisdiction over church schools would not be assumed or even inferred, but rather, there must be a clear, affirmative expression of congressional intent to bring church schools within the coverage of the Act. The Court specifically concluded that there was "no

connection with parents, in a thoroughly pervasive religious atmosphere.

⁴Both the District Court and the Court of Appeals concluded that FLSA coverage of RVCS would also pose such a significant risk of first amendment violations.

clear expression of an affirmative intention that teachers in church-operated schools should be covered by the Act". Id. at 504.

While the legislative history of the 1966 Amendment to the FLSA includes public and private schools in the definition of an enterprise for the purposes of coverage, there is not the requisite clear and affirmative intent present to show that Congress intended to cover church schools which are the religious mission of the church. At best, the colloquy upon which the Court of Appeals concluded that there was coverage only provides an inference of coverage. This inference is insufficient. Id.

The very unique nature of Shenandoah's educational ministry provides a vital distinction in this action that should lead the Court to examine the question of whether Congress clearly and affirmatively intended the FLSA to apply to church school ministries

such as RVCS. This action presents to the Court a new set of facts providing the opportunity to address the issue of coverage, as well as to affirm, in the delicate area of church state relations, its prior decision in Catholic Bishop. As such, the Court should grant the petition for a writ of certiorari.

2. THE TEACHING STAFF AT SHENANDOAH BAPTIST CHURCH PERFORMS THE FUNCTION OF MINISTERS AND, THEREFORE, THE TEACHERS ARE NOT EMPLOYEES FOR THE PURPOSE OF THE FAIR LABOR STANDARDS ACT AND THE EQUAL PAY ACT.

The legislative history of the FLSA, the EEOC guidelines, and case law all establish a ministerial exemption for coverage under the FLSA and EPA. The rationale supporting the exemption is that the relationship between the church and its ministers is beyond secular control or manipulation. Churches should be free to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine. Kedroff

v. St. Nichols Cathedral, 344 U.S. 94, 116 (1952).

While legislative history and the EEOC guidelines focus on the designation of an individual for the purpose of the ministerial exemption; for example, as a nun, priest, deacon, case law looks beyond the mere designation. In Rayburn v. General Conference of Seventh Day Adventist, 772 F.2d 1164 (4th Cir. 1985), cert. denied, 478 U.S. 1020 (1986), the court concluded that the ministerial exemption does not depend upon ordination, but upon the function of the position. "If the employee's primary duties consist of teaching, spreading the faith, church government, supervision of a religious order, or supervision or participation in religious ritual and worship, he or she should be considered clergy." Id. at 1169; (quoting, EEOC v. Southwestern Baptist Theological

Seminary, 651 F.2d 277 (5th Cir. 1981); cert. denied, 456 U.S. 905 (1982).

In McClure v. Salvation Army, 460 F.2d 553 (5th Cir. 1972), the court specifically examined McClure's role in the church, that is, the function of her position, and found that it was comparable to that of a minister. Although McClure performed various types of ministries while employed by the Salvation Army, the majority of her appointments related to financial affairs and administrative duties. The court, however, gave great deference to McClure's statement that "she considered herself as performing a religious function..., even while sitting behind a typewriter merely typing a letter." Id. at 1104.⁵

⁵The teachers at Shenandoah unequivocally stated that they considered themselves to be ministers. In addition, every teacher must teach Bible to students, as well as integrating biblical truth into each class. The teachers must teach each course in the

In Southwestern Baptist, 651 F.2d at 283, the Fifth Circuit Court of Appeals, relying on earlier decisions, examined several guidelines by which it determined which employees of the seminary were ministers. The court examined the religious content of courses, as well as the personal religious commitment of the faculty⁶ to determine their status. The court also examined whether or not the faculty members were intermediaries between the church

light of Shenandoah's biblical beliefs, philosophy, and Statement of Faith, with the view to indoctrinating students in Shenandoah's faith and practice. As such, the teachers should be accorded the status of a minister. See, e.g., Douglas Laycock, Towards A General Theory Of The Religion Clauses: The Case Of Church Labor Relations And The Right To Church Autonomy, 81 Col. L. Rev. 1373, 1411 (1981); Bruce N. Bagni, Discrimination In The Name Of The Lord: A Critical Evaluation Of Discrimination By Religious Organizations, 79 Col. L. Rev. 1514, 1543-45 (1979).

⁶The evidence at trial was unrefuted that teachers at Shenandoah felt called by God to teach there, that they made great personal and financial sacrifices to do so, and believed they were serving in full time ministry.

and students, attended to the religious needs of the students, or instructed the students in the whole of religious doctrine. In addition, the court found that employment decisions were made largely on the grounds of religious criteria. The court also recognized the unique role that faculty play in a church school. Id. at 283-284. In reaching its decision that the teachers were ministers, the court distinguished Southwestern Baptist from the case presented in EEOC v. Mississippi College, 626 F.2d 477 (1980), concluding that the facts were not the same in each case. The seminary was wholly religious, which was not the case for Mississippi College. Shenandoah, like Southwestern Baptist Seminary, is wholly religious.

Finally, as noted above, the exemption for purposes of Title VII, the FLSA or the EPA does not depend on ordination or any other sacerdotal or outward indicia but on the

function of the position. If that position is important to the spiritual mission of the church, then the individual should be accorded the status of minister. See, e.g., Rayburn, 772 F.2d at 1169.

The Court of Appeals did not focus on the function of the position. Rather, the court clearly focused on the external designation. For example, the court stated that the teachers at Shenandoah did not belong to any delineated religious order. In the Baptist faith there is no such designation. In fact, any of the indicia described in the guidelines or by the Court of Appeals would preclude entirely any female teacher at Shenandoah from qualifying for the exemption. No female teacher can ever be a nun, a member of a religious order, or a priest. Church doctrine prohibits the ordination of females either as ministers or deacons. Accordingly, the only criteria which legitimately could be examined

was articulated in Rayburn, that is, the function of the position. The Court of Appeals failed to examine correctly that function.⁷ Undeniably, the position of the teachers at RVCS is vitally important to the church's religious mission. This Court has repeatedly noted the importance of teachers to the religious mission of a church school. See Lemon, 403 U.S. at 616; Meek, 421 U.S. at 366; See also Catholic Bishop, 440 U.S. at 503.

The Court of Appeals' reliance on ordination and sacerdotal criteria places its

⁷The record at trial was replete with evidence that the teachers considered themselves to be ministers. Their position is that of fulfilling the religious mission of the church. They teach by example, serve as intermediaries between church and the students in the school, and tend to the students' spiritual needs through prayer, counsel, advice, and instruction. Teachers instruct in the whole doctrine of Shenandoah Baptist Church. Each teacher must be able to teach Bible formally as well as integrity biblical truth into every aspect of the classroom. A teacher's duty consists of spreading the faith of Shenandoah. Employment decisions regarding teachers are based on religious criteria.

opinion in conflict with Southwestern Baptist as well as Rayburn. The Court should grant the petition for writ of certiorari to review that conflict. In addition, the Court in this case can definitively establish the legal position of teachers in church schools and articulate the appropriate standard to be applied in cases such as these where there is a question of ministerial exemption.

3. THE APPLICATION OF THE FAIR LABOR STANDARDS ACT AND THE EQUAL PAY ACT TO SHENANDOAH BAPTIST CHURCH VIOLATES THE EQUAL PROTECTION CLAUSE OF THE UNITED STATES CONSTITUTION.

The Court of Appeals determined that there was no violation of the Equal Protection Clause by the application of the FLSA to RVCS. However, in reaching that conclusion the court, relying on this Court's analysis in Amos, 483 U.S. at 339, erroneously determined that a rational basis standard should apply rather than that of strict scrutiny.

In Amos, the Court determined that there was no need to apply a strict scrutiny analysis where a statute was neutral on its face and passed the Lemon test. Id. However, the Court of Appeals erroneously concluded that the FLSA, and in particular the ministerial exemption upon which Shenandoah's equal protection claim is based, did not discriminate among religions and was neutral on its face.

The legislative history and EEOC guidelines clearly show that the FLSA and EPA are not applied to employees of church schools who are members of a religious order, take a vow of poverty, or are ordained. However, the court below refused to grant the exemption to Shenandoah's teachers based on the conclusion that they were not nuns, priests, members of a religious order, ordained, nor did they

perform a sacerdotal function.⁸ The criteria used for the exemption clearly creates a suspect classification. The discrimination which results is among religions. It is not a facially neutral exemption. The Court should grant Shenandoah's petition for a writ of certiorari to review the Court of Appeals erroneous analysis and to reaffirm the appropriate standard of review, that of strict scrutiny.

In addition, the teachers at RVCS are similarly situated to a nun or priest who teach in a parochial school. The evidence at

⁸The evidence at trial showed that under traditional Baptist doctrine, there is no provision for Shenandoah's teachers to take a vow of poverty or to become a member of a religious order. The doctrine of Shenandoah also does not permit the formal ordination of women in the capacity of a minister, i.e., preacher or pastor, or as a deacon. The opportunity to perform the Court of Appeals' perceived sacerdotal functions, therefore, is limited to non-existent.

trial clearly established this similarity.⁹

The application of the exemption in this case creates a classification favoring some religious denominations over others, thereby interfering with a fundamental right. Such a classification can only be upheld if the government can show a compelling interest to justify it. Furthermore, the statute or classification must be narrowly or precisely tailored to further that compelling interest.

San Antonio Ind. School District v. Rodriguez, 411 U.S. 1, 18 (1973); See also Plyler v. Doe, 457 U.S. 202 (1982).

The exemption should be broadened to include those who perform functions similar to those which nuns and priests perform in Catholic church schools; that is, fulfilling the religious mission of the church in

⁹The Court of Appeals and the District Court ignored the unrefuted evidence at trial from two expert witnesses and a teacher as to that similarity.

teaching students in the biblical beliefs of that church. Otherwise, the equal protection clause is violated. See Catholic Bishop, 440 U.S. at 501. The Court should grant the petition for a writ of certiorari to address the question of the standard of review in equal protection cases directly involving suspect religious classifications.

4. THE APPLICATION OF FAIR LABOR STANDARDS ACT AND EQUAL PAY ACT TO SHENANDOAH BAPTIST CHURCH VIOLATES THE FIRST AMENDMENT OF THE UNITED STATES CONSTITUTION.

An analysis of both religion clauses of the first amendment, as they apply to this particular action, shows that the application of the FLSA and EPA to Shenandoah violates the amendment and raises significant constitutional questions.

A. Free Exercise Clause

In the light of Employment Div., Oregon Dept. of Human Resources v. Smith, 58 U.S.L.W. 4433 (1990), the Court should consider

granting Shenandoah's petition for a writ of certiorari to determine what test is applicable in analyzing Shenandoah's free exercise claim. Additionally, the Court may determine the analysis or criteria appropriate, if necessary, to elevate a claim of a free exercise violation to the compelling interest level of scrutiny. Shenandoah respectfully asserts that the test applicable in this action is that which was initially articulated in Sherbert v. Verner, 374 U.S. 398 (1963); See also Wisconsin v. Yoder, 406 U.S. 205 (1972).

Under Smith, it would appear that compelling interest scrutiny is applicable when a governmental classification is based on religion. Smith, 58 U.S.L.W. at 4437, n. 3; (citing, McDaniel v. Paty, 435 U.S. 618 (1978); Torcaso v. Watkins, 367 U.S. 488 (1961)). The criteria used by the court below to determine whether or not the ministerial

exemption applied to Shenandoah's teachers creates a governmental classification based on religion. The classification requires someone to either be a nun, priest, member of a religious order, or an ordained minister or deacon. Female teachers at Shenandoah, no matter what the function of their position, could never meet this criteria. The Court of Appeals, however, focused merely on sacerdotal indicia and ordination.

This action also presents the type of hybrid constitutional issue that the Court considered in Smith. Smith, 58 U.S.L.W. at 4436. Shenandoah not only asserts a free exercise clause claim, but it also asserts an establishment clause and an equal protection clause claim.

The interest presented in the present action is an independent liberty that occupies a preferred position. Yoder, 406 U.S. at 215. As such, it deserves the protection of

the strictest scrutiny. The Sherbert four part test, as a fundamental aspect of first amendment doctrine, should be applicable in analyzing the present action. See, e.g., Hernandez v. Commissioner, 490 U.S. at ____; Hobbie v. Unemployment Appeals Commission of Florida, 480 U.S. at 136, 141-42 (1987). This case also presents to the Court the opportunity to define the parameters of the Sherbert test when no criminal law violation is involved.

Under the first and second part of the Sherbert test, a question is presented as to whether or not Shenandoah's right to regulate, control, and administer its employment relationship with its employees and to be free to determine, define, and fund various ministries of the church are a sincerely held religious beliefs which are burdened. Moreover, the same issue arises as to Shenandoah's practice regarding the biblical

tenet of head of household. The Court of Appeals seemingly required that these beliefs be central to the action itself. However, that is not the question. Rather, it is whether the action that is burdened is based on and conducted pursuant to a sincerely held religious belief. Shenandoah has the right to base a policy regarding the payment of a supplement to certain teachers on a biblical basis, even if the Bible or religious belief does not require the payment of the supplement itself.

The third prong of the Sherbert test requires the government to justify a limitation on religious liberty only by showing that the limitation is essential to accomplish an overriding, compelling governmental interest. U.S. v. Lee, 455 U.S. 252, 262 (1982). To properly analyze this prong, the Court must determine correctly what is the interest.

The purpose of the FLSA is to protect workers from unfair employment practices and to protect the market from being undermined by those who exploit workers by paying substandard wages. See Alamo, 471 U.S. at 229. At trial, Shenandoah's teachers testified that they considered their work to be in response to a Divine call. They viewed their teaching as a ministry or place of service. It is not something from which they need protection.

In addition, the purpose of the FLSA in protecting the market from being undermined also is not applicable. Shenandoah, in its operation of RVCS, is not in competition in the market place with public or private schools. Parents, in sending their children to public schools only bear the economic burden of taxes, while Shenandoah's parents bear this economic burden as well as the burden of supporting RVCS through

contributions and tuition. Shenandoah exists to fulfill a religious mission. Parents send their children to RVCS because of its religious purpose. Coverage under the FLSA would not advance any overriding or compelling state interest.

However, assuming arguendo that the Court would conclude that the government had a compelling interest, the government's objectives are not carried out by the least restrictive means. In Callahan v. Woods, 736 F.2d 1269, 1282 (9th Cir. 1984), the court noted that it is the least restrictive means inquiry which is the critical aspect of the free exercise analysis. The question here becomes one of whether the government has a compelling interest in not exempting a religious individual from a particular regulation. Id. The only articulated reason presented by the Court of Appeals for not exempting Shenandoah's teachers is that

"[T]here is no principled way of exempting the school without exempting all other sectarian schools and thereby the thousands of lay teachers and staff members on their payrolls."

Appendix, p. 33. The Court of Appeal's analysis is faulty on this point because Shenandoah is basing its argument on the evidence that the school is totally integrated into the operation of the church. Therefore, only those schools which are totally integrated into the operation of the church and in which there is no practical way to identify many of the functions as to whether they are for the benefit of the church or the school would be exempt. Shenandoah submits that the Court should review the Court of Appeals' decision from this light and grant the petition.

B. Establishment Clause

The application of the FLSA and EPA also violates the establishment clause of the first

amendment. In Larson v. Valente, 456 U.S. 228, 244 (1982), the Court struck down a state statute which had the effect of placing special regulations on a particular religious denomination.

In a similar fashion, the application of the FLSA and EPA to Shenandoah's teachers, while not applying them to nuns and priests who perform the same function, clearly prefers one denomination over another. This is violative of the establishment clause.

The application of the FLSA and EPA of Shenandoah also presents a clear entanglement issue. As the Court noted in Amos, 483 U.S. at 317, the very issue by issue free exercise litigation, which is present in employment discrimination cases such as this action, results in considerable governmental entanglement in religious affairs. This chills and interferes with religious expression and doctrinal development and

enmeshes judges in futile attempts to understand the contours, sincerity, and centrality of religious beliefs. Id.; See generally, Forest Hills Early Learning Center v. Grace Baptist Church, 846 F.2d 260, 264 1988¹⁰.

Lastly, the Court in Lemon, 403 U.S. at 612-13, noted that where underlying regulations foster an excessive entanglement between the government and religion which is ongoing and intrusive, those statutes violate the establishment clause. The very statutes and regulations found to be constitutionally defective in Lemon are present in this action. Id. at 612-624. Accordingly, the Court should grant this petition for review.

¹⁰This is the exact issue presented in this action. The court below never understood Shenandoah's beliefs regarding Christian education, the centrality of that belief to the whole purpose of the church or the biblical basis and rationale for the head of household supplement.

5. THE AWARDING OF BACK PAY UNDER THE EQUAL PAY ACT TO SINGLE FEMALE TEACHERS, WHO WERE NOT A PART OF THE CLASS DESIGNATED TO RECEIVE THE HEAD OF HOUSEHOLD SUPPLEMENT, WAS ERRONEOUS.

The award entered by the District Court and affirmed by the Court of Appeals included wages for all female teachers whether they were married or single. Shenandoah's policy, however, was to pay the head of household supplement to married males or to formerly married females who had the responsibility of providing for dependents. No payments were ever made to single teachers, be they male or female. Shenandoah's policy regarding the head of household payment clearly was based on marital status.

This same question has been considered by several circuits and, in each case, the courts have found that a policy based on marital status was not unlawful. See e.g., Stroud v. Delta Airlines, Inc., 544 F.2d 892 (5th Cir. 1977); EEOC v. Delta Airlines, Inc., 578 F.2d

115 (5th Cir. 1978); Jurinko v. Edwin L. Wiegand Company, 477 F.2d 1038 (3rd Cir. 1973); Mabry v. State Bd. of Comm. Coll. and Occ. Educ., 813 F.2d 311 (10th Cir. 1987); See also Willett v. Emory and Henry College, 427 F. Supp. 631 (W.D. Va. 1977), affirmed, 569 F.2d 212 (4th Cir. 1978).

Shenandoah never had the intention to pay the head of household supplement to anyone, male or female, who had no dependents. The evidence at trial established the fact that the head of household supplement was never considered applicable to any class except those with dependents, that is, married or formerly married. Any discrimination which took place involved married persons or formerly married persons with dependents. Single persons were never discriminated against.

Given the frequency with which this issue has been addressed by the circuits, yet the

failure to apply the standard appropriately by the Court of Appeals below, the Court should grant review to affirm the conclusion that discrimination based on marital status is appropriate. In addition, the Court should review the rationale for the Court of Appeals' refusal to conclude that the single teachers were in a class which was never designated to receive the supplement.

6. THE AWARDING OF BACK PAY FOR MINIMUM WAGE DEFICIENCIES WITHOUT REGARD TO THE NATURE OF INDIVIDUAL EMPLOYMENT ACTIVITY WAS ERRONEOUS.

The Court of Appeals concluded that there was no evidence produced at trial that would provide a basis to distinguish between church and school related labor. The court's rationale was that Shenandoah had the responsibility for presenting this evidence. However, Shenandoah did in fact at trial raise the question of the exemption for church employees. It offered direct evidence, by way of three of the intervenors and the school

administration as to the nature of their work. The unrefuted evidence was that most of the employees performed some work for the church, some work for the school, and some work which could not be clearly categorized as to whether it was for the church or school.

It is Shenandoah's position that the government had the responsibility to delineate what was and was not in violation of the FLSA. The government failed to make this delineation. As a result, the courts below concluded that all church employees who had minimum wage deficiencies were employees of RVCS and, thus, were entitled to an award of back pay. However, the Court of Appeals erred in its analysis. The burden to prove a deficiency was on the government. It was not Shenandoah's burden to show there was no deficiency. This, in turn, would require the government to show what work was in violation of the FLSA. DOL did not do this. The Court

should review the decision below to examine the appropriate burden in this case.

IX. CONCLUSION

By its decision on March 30, 1990, set forth in the appendix, the Court of Appeals concluded that the FLSA and EPA applied to Shenandoah. In reaching this decision, the Court of Appeals ignored the nature of RVCS, its relationship to Shenandoah, and erroneously found that Congress affirmatively intended the Acts to apply to church schools. Additionally, the Court of Appeals determined that teachers of RVCS were not entitled to a ministerial exemption from the EPA, thereby deciding an important federal question contrary to a previous decision reached by the Fourth Circuit and a decision of the Fifth Circuit.

The Court of Appeal's decision also raises important constitutional questions involving the First Amendment and the Equal

Protection Clause. These issues are of national importance and should be reviewed by this Court. The opinion below evidences confusion as to the standard and rationale applicable in determining the class of teachers eligible to receive the supplement and the party responsible to carry the burden of proof as to which employment was in violation of the FLSA. Accordingly, the petition for writ of certiorari should be granted to review the decision below and answer the important federal questions and constitutional issues.

SHENANDOAH BAPTIST CHURCH

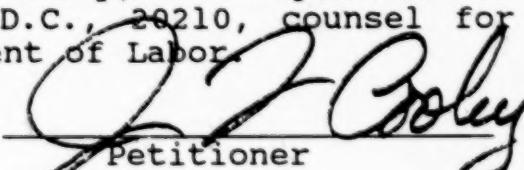
By: Donald W. Huffman
Donald W. Huffman
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By: John L. Cooley
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X. PROOF OF FILING AND SERVICES

I, John L. Cooley, counsel for the petitioner and member of the Bar of the Supreme Court of the United States, do hereby certify that on the 27 day of June, 1990, I

filed the foregoing petition for writ of certiorari with the Clerk of the Supreme Court of the United States by mailing forty copies of the same together with the filing fee in a duly addressed envelope by First Class Mail with postage thereon prepaid addressed to Mr. Joseph F. Spaniol, Jr., Clerk, Supreme Court of the United States, 1 First Street, N.W., Room 30, Washington, D.C., 20543; and I also served a true copy of the foregoing petition on the respondents by mailing three copies of the same in a duly addressed envelope by First Class Mail with postage thereon prepaid addressed to Charles A. Shaner, General Counsel, Gwendolyn Young Reams, Associated General Counsel, Vincent J. Blackwood, Assistant General Counsel, and Samuel A. Marcosson, Attorney, U.S. Equal Employment Opportunity Commission, Washington, D.C., 20507, counsel for the respondent, Equal Employment Opportunity Commission, and to Jerry G. Thorn, Acting Solicitor, Monica Gallagher, Associate Solicitor, Linda Jan S. Pack, Counsel for Appellate Litigation, and William J. Stone, Attorney, U.S. Department of Labor, Washington, D.C., 20210, counsel for respondent, Department of Labor



Petitioner

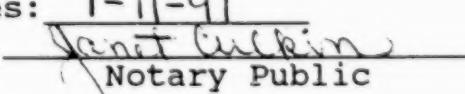
STATE OF VIRGINIA)

) to-wit:

CITY OF ROANOKE)

The foregoing proof of filing and service was subscribed and sworn to before me by John L. Cooley, this 27 day of June, 1990.

My Commission Expires: 1-11-91



Janit Culkin

Notary Public

XI. APPENDIX

The appendix consists of:

(1) A copy of the opinion of the United States Court of Appeals for the Fourth Circuit on March 30, 1990. Decision is sought to be reviewed. Page A-1

(2) Pertinent portions of the text of statutory and constitutional provisions cited in Part VI of the Petition. Page A-50

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 89-2341

ELIZABETH DOLE, SECRETARY, UNITED STATES
DEPARTMENT OF LABOR; EQUAL EMPLOYMENT
OPPORTUNITY COMMISSION,

Plaintiffs - Appellees,

v.

SHENANDOAH BAPTIST CHURCH; CAROL C. ANDERSON;
LOLA D. CLIFTON; LORETTA B. DILLON; DOROTHY M.
DIXON; ALMA S. GREENE; DELILAH F. GROSS;
MARGARET HARVEY; MARY ANN HERNDON; JEFFREY P.
KESSLER; JOHN T. KESSLER; SHIRLEY I. KESSLER;
JOYCE T. MARTIN; EVA T. MURDOCK; SHERRY R.
PADGETT; ANTOINETTE L. PARSONS; BARBARA C.
SHELOR; DONNA SHELOR; MARY BETH SHELOR; ANN T.
SHELTON; RUTH WESSELINK; DONNA M. WOMACK,

Defendants - Appellants

No. 89-2369

ELIZABETH DOLE, SECRETARY, UNITED STATES
DEPARTMENT OF LABOR; EQUAL EMPLOYMENT
OPPORTUNITY COMMISSION,

Plaintiffs - Appellants,

v.

SHENANDOAH BAPTIST CHURCH; CAROL C. ANDERSON;
LOLA D. CLIFTON; LORETTA B. DILLON; DOROTHY M.
DIXON; ALMA S. GREENE; DELILAH F. GROSS;
MARGARET HARVEY; MARY ANN HERNDON; JEFFREY P.

KESSLER; JOHN T. KESSLER; SHIRLEY I. KESSLER;
JOYCE T. MARTIN; EVA T. MURDOCK; SHERRY R.
PADGETT; ANTOINETTE L. PARSONS; BARBARA C.
SHELOR; DONNA SHELOR; MARY BETH SHELOR; ANN T.
SHELTON; RUTH WESSELINK; DONNA M. WOMACK,

Defendants - Appellees.

Appeals from the United States District Court
for the Western District of Virginia, at
Roanoke. James C. Turk, Chief District Judge.
(CA-78-115-R)

Argued: January 9, 1990

Decided:

March 30, 1990

Before SPROUSE and CHAPMAN, Circuit Judges,
and HOFFMAN, Senior United States District
Judge for the Eastern District of Virginia,
sitting by designation.

Affirmed by published opinion. Judge Sprouse
wrote the opinion, in which Judge Chapman and
Senior Judge Hoffman joined.

ARGUED: Donald W. Lemons, DURRETTE, IRVIN & LEMONS, P.C., Richmond, Virginia; Donald Wise Huffman, BIRD, KINDER & HUFFMAN, Roanoke, Virginia, for Appellants. Samuel Alan Marcosson, UNITED STATES EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, Washington, D.C.; William J. Stone, UNITED STATES DEPARTMENT OF LABOR, Washington, D.C., for Appellees. ON BRIEF: John L. Cooley, FOX, WOOTEN & HART, P.C., Roanoke, Virginia, for Appellants. Charles A. Shanor, General Counsel, Gwendolyn Young Reams, Associate General Counsel, UNITED STATES EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, Washington, D.C.; Jerry G. Thorn, Acting Solicitor, Monica Gallagher, Associate Solicitor, Linda Jan S. Pack, Counsel for Appellate Litigation, UNITED STATES DEPARTMENT OF LABOR, Washington, D.C., for Appellees.

SPROUSE, Circuit Judge:

The dispute underlying this appeal arose when the federal government sought to apply certain provisions of the Fair Labor Standards Act (the Act or the FLSA)¹ to the Roanoke Valley Christian Schools (Roanoke Valley) operated by Shenandoah Baptist Church. The church and twenty-one intervening employees

¹Title 29 U.S. C. §§ 201 et seq. The Equal Pay Act of 1963 amended the FLSA and is codified at § 206(d).

(Shenandoah) urge that the district court erred in awarding back pay for teachers (for equal pay violations) and for nonprofessional support staff (for minimum wage violations). Shenandoah asserts that Roanoke Valley is not covered by the FLSA; that application of the Act violates the free exercise and establishment clauses of the first amendment and the equal protection guarantee of the fifth amendment; and that, even if the Act does apply, the damages were improperly calculated. The government cross-appeals, contending that the trial court abused its discretion in declining to award prejudgment interest and in refusing to grant injunctive relief. We affirm the decision of the district court in all respects.

I. Facts

The Shenandoah Baptist Church was founded in 1971 as an independent Baptist church which trusts in the absolute authority of the Bible.

Shenandoah asserts, and the government has not disputed, that the church views Christian education as a vital part of its mission. Shenandoah believes the "Great Commission" of Matthew 28:19-20 requires the church to evangelize, baptize, and teach:

Go ye, therefore, and teach all nations, baptizing them in the name of the Father, and of the Son, and of the Holy Ghost, teaching them to observe all things whatsoever I have commanded you and, lo, I am with you always even unto the end of the world.

Shenandoah opened Roanoke Valley in 1973, with a full-time curriculum that included instruction in Bible study and in traditional academic subjects into which biblical material had been integrated. The school gradually expanded until, by 1977, it offered classes from kindergarten through high school. The teaching staff expanded accordingly, from twenty to about thirty teachers between 1976 and 1986, the years at issue in this case.

Roanoke Valley teachers received base salaries of about \$6000 for the 1976 school year. Because this low salary level made it difficult to attract teachers, Shenandoah instituted a head-of-household salary supplement. Pastor Robert L. Alderman explained the basis for the supplement in this way:

When we turned to the Scriptures to determine head of household, by scriptural basis, we found that the Bible clearly teaches that the husband is the head of the house, head of the wife, head of the family We moved in that direction, thinking that our opportunity and responsibility of basing our practice on clear biblical teaching would not be a matter of question.

The supplement ranged from \$1600 in the 1976-77 school year to \$200 during the 1985-86 school year. By that time, base salaries had been increased to about \$12,500, and the supplement was discontinued.

Between 1976 and 1986, all married male teachers received a salary supplement.

Married women were not eligible to receive the supplement. It was not paid to a woman whose husband was a full-time graduate student, nor to a woman who raised two children on her teaching income after her husband, who had become disabled and mentally ill, left the family. Another mother of two who was separated from her husband was not paid the supplement for two years until her divorce became final. Between 1981 and 1986, three divorced female teachers who had dependents did receive the supplement. No woman received a supplement prior to 1981.

Also, between 1976 and 1982, ninety-one persons who worked at Roanoke Valley as support personnel were paid less than the hourly minimum wage. These workers included bus drivers, custodians, kitchen workers, bookkeepers, and secretaries.

II. Procedure

In 1978, the government brought this action,² alleging that Shenandoah had violated two aspects of the Fair Labor Standards Act. The government asserted that Shenandoah had paid Roanoke Valley support personnel less than the minimum wage and had paid female teachers less than male teachers performing the same job. 29 U.S.C. § 206(a) and (d).³ The complaint sought permanent injunctive relief and back pay with interest. The par-

²Title 29 U.S. C. § 216 authorizes the government to sue on behalf of employees and to supervise the distribution of any funds recovered. This claim was filed by the Secretary of Labor. Elizabeth Dole, the current Secretary, is named in the caption of this opinion pursuant to Fed. R. App. P. 43(c)(1). When administration of equal pay claims was transferred to the Equal Employment Opportunity Commission (EEOC) in 1979, the EEOC jointed the action as a plaintiff. The Secretary of Labor and the EEOC are referred to in this opinion as "the government."

³Teachers and academic administrators are exempt from the Act's minimum wage provisions, but are covered by its equal pay requirements. 29 U.S.C. § 213(a)(1).

ties stipulated to many of the key facts. Shenandoah acknowledged that, between 1976 and 1982, support personnel were paid less than the statutory minimum wage. Shenandoah also conceded that, between 1976 and 1986, most full-time female teachers at Roanoke Valley were paid less than most full-time male teachers, although their "skill, effort, responsibility and working conditions" were "substantially equal." But Shenandoah asserted that the school was not covered by the FLSA and that applying the statute to a church-run school like Roanoke Valley would be unconstitutional.

In 1983, the district court entered partial summary judgment in favor of the government on the minimum wage claim.⁴ Donovan v. Shenandoah Baptist Church. 573 F.

⁴A motion by the government for partial summary judgment on the equal pay claim was denied in 1987.

Supp. 320 (W.D. Va. 1983) (Shenandoah I). The court concluded that Congress intended the Act to apply to church-run schools, that Shenandoah's nonprofessional support staff was not exempt from the statute's coverage, unlike members of recognized "religious orders," and that requiring Shenandoah to comply with the statute's minimum wage provisions would not violate the church's first amendment rights. Twenty-one of the nonprofessional staff members subsequently intervened to assert their own first amendment rights and to support Shenandoah's position.

The case was tried to the district court and a seven-member advisory jury in September 1988. Based on its holding in Shenandoah I and on the parties' stipulations, the court found that Shenandoah had violated the FLSA minimum wage requirement. The court ruled that the equal pay provisions of the Fair Labor Standards Act also apply to Roanoke

Valley and then posed two questions to the advisory jury. The panel found "that the female school teachers . . . were paid less than the male teachers who were performing equal work" and that the salary differential was "not based on a factor other than sex." The district court adopted these findings in its subsequent opinion and rejected arguments by Shenandoah and the intervenors that application of the FLSA infringed their first and fifth amendment rights. Department of Labor v. Shenandoah Baptist Church, 707 F. Supp. 1450 (W. D. Va. 1989) (Shenandoah II).

The trial court ordered Shenandoah to pay the government \$16,818.46 in back pay to be distributed to the support staff members who were the subject of the minimum wage claim and \$177,680 to be distributed to the teachers who were the subject of the equal pay claim. The court declined to award prejudgment interest. The court also refused to enjoin Shenandoah

from violating the Act in the future or from soliciting employees for the return of back pay awards.

Both Shenandoah and the government appeal. Shenandoah urges that Roanoke Valley is not covered by the Fair Labor Standards Act. It insists that applying the Act here violates the free exercise and establishment clauses of the first amendment and the equal protection guarantee of the fifth amendment. Shenandoah also argues that the district court erred in its damage calculations by awarding back pay to single female teachers and by awarding back pay to support staff members without regard to whether their work was church-related or school-related. The government argues that the district court abused its discretion in refusing to award prejudgment interest on the back pay awards

and in failing to grant injunctive relief.⁵ We address these contentions seriatim.

III. Applicability of the Fair Labor Standards Act

Shenandoah urges that the strictures of the Fair Labor Standards Act do not apply to Roanoke Valley. We disagree. Two conditions are necessary for the FLSA to apply. The first is that Roanoke Valley be an "enterprise" within the definition of the Act; the second is that the teachers and support staff be "employees." See 29 U.S.C. §§ 203(r) & (e); Tony & Susan Alamo Found. v. Secretary of Labor, 471 U.S. 290, 295 (1985). We begin with the question of enterprise.

When the FLSA was amended in 1961 to cover enterprises as well as individuals,

⁵On appeal, the government no longer asks that Shenandoah be prohibited from soliciting employees for the return of back wages. It appears only the court's refusal to enjoin Shenandoah from violating the Act in the future.

nonprofit religious and educational organizations were exempt, provided they were not engaging in ordinary commercial activities. See Alamo, 471 U.S. at 297-98.⁶ However, Congress amended the statute again in 1966 to include public and private schools in the definition of enterprise. The amended statute explicitly states that nonprofit schools are within the scope of the Act:

"Enterprise" means the related activities performed (either through unified operation or common control) by any person or persons for a common business purpose, and includes all such activities whether performed in one or more establishments or by one or more corporate or other organizational units For purposes of this subsection, the activities performed by any person or persons--

(1) in connection with the operation of . . . a preschool, elementary or secondary school, or an institution of higher

⁶The ordinary commercial activities of religious organizations are covered by the Act. See, e.g., id. at 298-99; Brock v. Wendell's Woodwork, 867 F.2d 196, 198-99 (4th Cir. 1989); Mitchell v. Pilgrim Holiness Church Corp., 210 F.2d 879, 884 (7th Cir.), cert. denied, 347 U.S. 1013 (1954).

education (regardless of whether or not such . . . school is public or private or operated for profit or not for profit) .

• • •

• • •

shall be deemed to be activities performed for a business purpose.

29 U.S.C. § 203(r); see also 29 U.S.C. § 203(s)(5).

Shenandoah urges that this amendment does not demonstrate a clear "affirmative intention" by Congress that the Act apply to church-operated schools. NLRB v. Catholic Bishop. 440 U.S. 490, 501 (1979).⁷ However,

⁷In Catholic Bishop, the Court held that in a case raising serious first amendment question, "we must first identify the affirmative intention of the Congress clearly expressed" before concluding that the statute applied. Id. But the Alamo Court appeared to back away from this heightened level of statutory analysis, saying, "Because we perceive no 'significant risk' of an infringement on First Amendment rights, we do not require any clearer expression of congressional intent to regular these activities." 471 U.S. at 298 n.18 (citations omitted). Justice White, who authored the Alamo opinion, was a dissenter in Catholic Bishop.

an examination of the legislative history of the amendment belies that argument. The provision as originally presented to the House would have covered institutions of higher learning but not elementary and secondary schools. Congressman Collier proposed the language adding public and private elementary and secondary schools. During debate, the following exchange took place:

Mr. PUCINSKI. Let us consider a parochial elementary school, in which the nuns do the work in the cafeteria. Would they have to be paid a minimum wage?

Mr. COLLIER. No, they would not be covered.

Mr. BURTON of California. Mr. Chairman, will the gentleman yield?

Mr. COLLIER. I am delighted to yield to the gentleman from California.

Mr. BURTON of California. As I understand, it is not the gentleman's

The tension between these two cases does not present a problem here because, under the more exacting Catholic Bishop standard, we find that Congress affirmatively intended to apply the FLSA to schools such as Roanoke Valley.

intention to include members of a religious order under the definition of an employee, and therefore a nun would not be considered an employee. Therefore, a minimum wage would not be required to be paid a nun. Am I correct in my understanding of the gentleman's intention?

Mr. COLLIER. That is correct. I did not intend to cover them.

112 Cong. Rec. 11371 (1966). The critical concern for the legislators was not whether a parochial elementary school was an enterprise. They assumed that such a school was an enterprise and moved directly to the separate question of whether the nun was an employee.

The conclusion that church-operated schools are encompassed within the Act's definition of enterprise is supported by subsequent legislative action. Cf. Andrus v. Shell Oil Co. 446 U.S. 657, 666 (1980); see also 2A Sutherland Statutory Construction § 49.11 (Sands 4th ed. 1984). In 1977, Congress again amended the FLSA to create an exemption for "religious or non-profit educational

conference center[s]." 29 U.S.C. § 213(a)(3); see also 123 Cong. Rec. 32724-26 (1977). Such an exemption would not have been necessary if church-operated educational facilities had been excluded under the statutory definition of enterprise.

Inclusion of church-operated schools under the protective umbrella of the Act is also consistent with Supreme Court precedent construing the FLSA "liberally to apply to the furthest reaches consistent with congressional direction." Alamo, 471 U.S. at 296 (quoting Mitchell v. Lublin, McGaughy & Assocs., 358 U.S. 207, 211 (1959)).

We therefore hold that the history of the statute demonstrates an affirmative intention by legislators to treat church operated schools as enterprises. Accord Marshall v. First Baptist Church. 23 Wage & Hour Cas. (BNA) 386 (D.S.C. 1977); see also Ritter v. Mount St. Mary's College. 495 F. Supp. 724 (D.

Md. 1980) (holding to the contrary), rev'd in relevant part. 738 F.2d 431 (1984) (table). The Ninth Circuit implicitly acknowledged this principle in EEOC v. Fremont Christian School. 781 F.2d 1362, 1367 (9th Cir. 1986), applying the equal pay provisions of the FLSA to a church-operated school which provided health insurance only for heads of households. See also Russell v. Belmont College. 554 F. Supp. 667, 670-76 (M.D. Tenn. 1982) (denying college's motion for summary judgment); Marshall v. Pacific Union Conference, 23 Wage & Hour Cas. (BNA) 316 (C.D. Cal. 1977) (denying conference's motion for summary judgment)⁸; cf. Archbishop of Roman Catholic Apostolic Archdiocese v. Guardiola. 628 F.

⁸Justice Rehnquist, acting as circuit justice, subsequently refused to stay discovery in Pacific Union Conference, 434 U.S. 1305 (1977); see also Donovan v. Central Baptist Church, Victoria, 96 F.R.D. 4 (S.D. Tex. 1982) (denying church's motion for protective order).

Supp. 1173, 1178-79 (D.P.R. 1985) (holding lay Catholic Church employees are covered by the Puerto Rico Minimum Wage Act, which is modeled on the FLSA).⁹

Shenandoah urges nevertheless that Roanoke Valley should not be covered by the statute because it is inextricably intertwined with the church. It argues that school employees are really church employees and therefore not covered by the FLSA. Shenandoah asserts that the church and school share a common physical plant and a common payroll account, that the associate pastor for school ministries reports to the pastor, that the pastor hires all teachers, and that school

⁹Cases declining to apply labor statutes to church-operated schools have involved other statutes with legislative histories devoid of any indication as to the applicability of the statute to religious schools. See, e.g., Catholic Bishop, 440 U.S. at 50406 (NLRA); Cochran v. St. Louis Preparatory Seminary, 717 F. Supp. 1413, 1416 (E.D. Mo. 1989) (ADEA). Here, the legislative history favors application of the FLSA to Roanoke Valley.

staff must subscribe to Shenandoah's statement of faith.¹⁰ Shenandoah insists, "The school is the church."

Shenandoah relies on Corporation of Presiding Bishop v. Amos, 483 U.S. 327 (1987), and Forest Hills Early Learning Center v. Grace Baptist Church, 846 F.2d 260, 263-64 (4th Cir. 1988), cert. denied, 109 S. Ct. 837 (1989), for the proposition that the government should be required to accept the church's characterization of Roanoke Valley as an inseverable part of the church. Shenandoah's reliance is misplaced. These

¹⁰Shenandoah points to St. Martin Evangelical Lutheran Church v. South Dakota, 451 U.S. 772 (1981), which held that teachers in a Christian school that did not have a separate legal identity from the church were employees of the church. However, St. Martin turned on the construction of an unemployment compensation statute which explicitly distinguished between employees of a church and employees of separately incorporated organizations. 451 U.S. at 782. Congress did not create the framework for such a distinction in the FLSA.

cases only considered whether legislators could exempt religious organizations from certain statutory provisions without running afoul of the First Amendment. They concluded that such exemptions were constitutionally permissible; they did not hold that they were mandatory. See County of Allegheny v. Pittsburgh ACLU, 492 U.S. ___, 109 S. Ct. 3086, 3105 n.51 (1989). The case sub judice presents an entirely different question--whether Congress intended the FLSA to include (not exclude, as in Amos and Forest Hills) church-operated schools. We hold that Congress affirmatively intended the Act to apply to such schools.

Shenandoah also asserts that the second criterion for application of the Fair Labor Standards Act is not present here because

Roanoke Valley teachers are not "employees."¹¹ It urges that they are ministers and therefore covered by the "ministerial exemption" from the Act.¹² This exemption is derived from the congressional debate excerpted above and delineated in guidelines issued by the Labor Department's Wage and Hour Administrator:

Persons such as nuns, monks, priests, lay brothers, ministers, deacons and other members of religious orders who serve pursuant to their religious obligations in the schools . . . operated by their church or religious order shall not be considered to be "employees".

Field Operations Handbook, Wage and Hour Division, U.S. Dep't of Labor, § 10b03(b) (1967). Shenandoah states that Roanoke Valley

¹¹The statutory definition of employee is singularly unhelpful. It states: "[T]he term "employee" means any individual employed by an employer." 29 U.S.C. § 203(e)(1).

¹²Shenandoah had also argued below that nonprofessional support staff members were ministers and subject to the exemption. The district court rejected this argument, Shenandoah I, 573 F. Supp. at 323, and Shenandoah does not raise it in a statutory context on appeal.

teachers consider teaching to be their personal ministry. It urges that all classes are taught from a pervasively religious perspective, and that teachers lead students in prayer and are required to subscribe to the Shenandoah statement of faith as a condition of employment.

Shenandoah contends that the characterization of Roanoke Valley teachers as ministers is consistent with this court's holding in Rayburn v. General Conference of Seventh-Day Adventists, 772 F.2d 1164 (4th Cir. 1985), cert. denied. 478 U.S. 1020 (1986). In Rayburn, we explained that the ministerial exemption in Title VII depended upon the function of the position, not simply on ordination. Id. at 1168. But the facts of Rayburn are far removed from those of the case at bar. There the claimant, whom we ultimately characterized as clergy, was a woman who held the degree of Master of

Divinity from the church's theological seminary and who sought appointment to the seven-person pastoral staff of one of the denomination's largest congregations.¹³

The teachers in the present case perform no sacerdotal functions; neither do they serve as church governors. They belong to no clearly delineated religious order. Shenandoah insists that there is no cognizable difference between its teachers and nuns who teach in church-affiliated schools, but it has

¹³Another Title VII case relied on by Shenandoah is also factually distinct. In EEOC v. Southwestern Baptist Theological Seminary, 651 F.2d 277, 283 (5th Cir. 1981), cert. denied. 456 U.S. 905 (1982)), the Fifth Circuit held members of the faculty of a theological seminary to be ministers; however, most were ordained members of the clergy whose job it was to train "the future ministers of many local Baptist churches." The Southwestern Baptist court also expressly stated that, "While religious organizations may designate persons as ministers for their religious purposes free from any governmental interference, bestowal of such a designation does not control their extra-religious legal status." Id.

failed to adequately support this assertion.¹⁴ Cf. Fiedler v. Marumsco Christian School, 631 F.2d 1144, 1153 (4th Cir. 1980); Triple "AAA" Co. v. Wirtz, 378 F.2d 884, 887 (10th Cir.), cert. denied, 389 U.S. 959 (1967).

This is not to minimize the vocation of the Roanoke Valley teachers or the sincerity which they bring to it. But "[e]xemptions from the Fair Labor Standards Act are narrowly construed," Hodgson v. Duke Univ., 460 F.2d 172, 174 (4th Cir. 1972), and, as the district court has observed, the exemption of these teachers would "create an exception capable of

¹⁴Shenandoah directs us to the testimony of one Roanoke Valley teacher who attended a Catholic school as a child and testified that her role as a teacher at Roanoke Valley was the same as that of a nun in a Catholic school. Another Shenandoah witness, the executive director of the Association of Christian Schools International, discussed the role of nuns in school, but the district court found "his description of his research . . . too ambiguous for the court to credit his expertise in the subject." Having reviewed the evidence, we agree with the district court's characterization.

swallowing up the rule." Shenandoah I, 573 F. Supp. at 323. We therefore decline to give the ministerial exemption the sweeping interpretation Shenandoah seeks.¹⁵ The Supreme Court has explained "[t]he test of employment under the Act is one of 'economic reality.'" Alamo, 471 U.S. at 301. The economic reality in this case is that the Roanoke Valley teachers are employed as lay teachers in a church-operated private school.

We therefore hold that Congress intended church-operated schools such as Roanoke Valley to be covered by the Fair Labor Standards Act, and that their teachers and support staff are employees under the Act. We next consider the

¹⁵Ministerial exemptions have also been construed narrowly in other contexts. "Certainly all members of a religious organization or sect are not entitled to the exemption by reason of their membership, even though in their belief each is a minister." Dickinson v. United States, 346 U.S. 389, 394 (1953) (selective service); see also Olsen v. Commissioner, 709 F.2d 278, 282 (4th Cir. 1983) (tax).

constitutional challenges raised by Shenandoah Baptist to application of the statute.

IV. Free Exercise of Religion

Shenandoah and its intervenors argue that application of the Fair Labor Standards Act impermissibly burdens their first amendment right to free exercise of their religious beliefs. Our review of this free exercise claim requires that we first examine the burden on the exercise of Shenandoah's sincerely-held religious beliefs, then determine whether the state presents a compelling justification for imposing this burden, and finally balance the burden on free exercise against the hindrance to the state's goal that would arise from exempting Shenandoah from the Act's coverage. Rayburn, 772 F.2d at 1168 (citing Wisconsin v. Yoder, 406 U.S. 205 (1972)).

Shenandoah urges that application of the FLSA impairs the church's ability to

administer its relationship with employees and thereby its "power to decide . . . , free from state interference, matters of church government as well as those of faith and doctrine." Kedroff v. St. Nicholas Cathedral, 344 U.S. 94, 116 (1952). Shenandoah further asserts that its head-of-household practice was based on a sincerely-held belief derived from the Bible. The intervenors claim that allowing their wages to be set by the government, rather than by church governors acting under divine guidance, deprives them of blessings they would otherwise receive by allowing their Lord to supply their needs. On these bases, the church and intervenors insist that application of the Act to Roanoke Valley would burden the free exercise of their religious beliefs.

However, our examination of the record reveals that any burden would be limited. The pay requirements at issue do not cut to the

heart of Shenandoah beliefs. Although Shenandoah's head of-household pay supplement was grounded on a biblical passage, church members testified that the Bible does not mandate a pay differential based on sex. They also testified that no Shenandoah doctrine prevents Roanoke Valley from paying women as much as men or from paying the minimum wage. Indeed, the school now complies with the FLSA: teachers were last paid a head-of-household supplement in 1986, and all support staff members have been paid at or above minimum wage levels since 1982. The fact that Roanoke Valley must incur increased payroll expenses to conform to FLSA requirements is not the sort of burden that is determinative in a free exercise claim. Cf. Jimmy Swaggart Ministries v. Board of Equalization, 110 S. Ct. 688, 698 (1990); Hernandez v. Commissioner, 490 U.S. __, 109 S. Ct. 2136, 2149 (1989); Bob Jones Univ. v. United States 461 U.S. 574, 603-04

(1983); Braunfeld v. Brown, 366 U.S. 599, 605-06 (1961). Furthermore, the pastor testified that Shenandoah had no objection to complying with state fire, health, and safety requirements, and had withheld income tax from employees' wages and paid social security tax.

Regarding the intervenors' assertion that receipt of a government-mandated minimum wage may interfere with their reliance on God, we observe, as did the court below and the Supreme Court in Alamo, that the intervenors retain the option of volunteering their services or returning to Shenandoah all or part of their back pay awards. See 471 U.S. at 304.

Against what is, at most, a limited burden to Shenandoah's free exercise rights, we must weigh the reasons for applying both the minimum wage and equal pay provisions of the FLSA to Roanoke Valley. These reasons must be compelling. Hobbie v. Unemployment

Appeals Comm'n, 480 U.S. 136, 141-42 (1987). We find that they are. The Seventh Circuit has described the Fair Labor Standards Act as "a remedial measure seeking to insure to the workers of the United States . . . a minimum wage sufficient to maintain a minimum standard of living which Congress deemed to be necessary to their well-being." Mitchell v. Pilgrim Holiness Church Corp., 210 F.2d 879, 883 (7th Cir.), cert. denied. 347 U.S. 1013 (1954); see also Alamo, 471 U.S. at 302. Concerning the equal pay provisions of the FLSA, the Supreme Court has explained:

Congress' purpose in enacting the Equal Pay Act was to remedy what was perceived to be a serious and endemic problem of employment discrimination in private industry --the fact that the wage structure of "many segments of American industry has been based on an ancient but outmoded belief that a man, because of his role in society, should be paid more than a woman even though his duties are the same."

Corning Glass Works v. Brennan, 417 U.S. 188, 195 (1974) (quoting S. Rep. No. 176, 88th Cong., 1st Sess. 1 (1963)); cf. Rayburn. 772

F.2d at 1168 ("It would . . . be difficult to exaggerate the magnitude of the state's interest in assuring equal employment opportunities for all, regardless of race, sex, or national origin."). We therefore conclude that this case presents state "interests of the highest order," Yoder. 406 U.S. at 215, against which we must weigh the concerns of Shenandoah and its intervenors.

In this case, the balance tips toward the application of the FLSA to Roanoke Valley. There is no principled way of exempting the school without exempting all other sectarian schools and thereby the thousands of lay teachers and staff members on their payrolls. This would undermine the congressional goal of making minimum wage and equal pay requirements applicable to private as well as public

schools.¹⁶ Cf. United States v. Lee, 455 U.S. 252, 259-60 (1982). Congress has here created a comprehensive statute, and a less restrictive means of attaining its aims is not available. See Braunfeld. 366 at 607; cf. Sherbert v. Verner, 374 U.S. 398, 408-09 (1963). See generally New Life Baptist Church Academy v. East Longmeadow, 885 F.2d 940, 946-48 (1st Cir. 1989). As the Supreme Court explained in Alamo, "the purposes of the Act require that it be applied even to those who would decline its protections." 471 U.S. at 302. We therefore conclude that application of the FLSA to Roanoke Valley does not violate

¹⁶Shenandoah urges that the congressional exception for religious orders demonstrates that its interest in application of the FLSA is less than compelling. We do not agree that the closely circumscribed ministerial exemption has such an effect. See Hernandez, 109 S. Ct. at 2149. To conclude otherwise would "radically restrict the operating latitude of the legislature." Braunfeld, 366 U.S. at 606.

the first amendment free exercise rights of Shenandoah or the intervenors.

V. Establishment of Religion

Shenandoah next urges that application of the Fair Labor Standards Act to Roanoke Valley violates the establishment clause. Our analysis is, of course, guided by Lemon v. Kurtzman. 403 U.S. 602, 612-13 (1971), which held that to pass constitutional muster a statute must (1) have a secular legislative purpose, (2) have a primary effect that neither advances nor inhibits religion, and (3) not foster excessive government entanglement with religion. Shenandoah does not dispute that the FLSA has a secular purpose. However, the church protests that the effect of the FLSA is to violate "[t]he clearest command of the Establishment Clause . . . that one religious denomination cannot be officially preferred over another." Larson v. Valente. 456 U.S. 228, 244 (1982).

Shenandoah claims that the Roman Catholic Church is officially preferred under the Act because nuns and priests are included in the ministerial exemption while lay teachers and staff members at Roanoke Valley are not. We do not agree that the ministerial exemption creates an official preference. The exemption is facially neutral, encompassing ministers, deacons, and members of religious orders in any faith, not exclusively Catholic nuns and priests. See Hernandez, 109 S. Ct. at 2146-47. It is based on a determination that members of the clergy should not be characterized as employees, not on a decision to prefer any specific religion. See 112 Cong. Rec. 11371 (1966) (excerpted supra). Lay teachers and support staff at Catholic schools are covered by the FLSA as are the lay teachers and staff at Roanoke Valley. The Supreme Court has held that such a facially neutral provision which accommodates free exercise

values does not constitute an establishment clause violation. Gillette v. United States, 401 U.S. 437, 451-54 (1971).

Shenandoah also asserts that applying the Act to Roanoke Valley spawns impermissible government entanglement with religion. The church complains that the government inspection, monitoring, and review required to implement the Act intrude into church affairs. See Lemon. 403 U.S. at 612-13. But the Supreme Court rejected this argument in Alamo, holding that "the recordkeeping requirements of the Fair Labor Standards Act, while perhaps more burdensome in terms of paperwork, are not significantly more intrusive into religious affairs" than fire inspection and building and zoning regulations. 471 U.S. at 305-06; see also Swaggart, 110 S. Ct. at 698-99;

Hernandez, 109 S. Ct. at 2147-48.¹⁷ We therefore hold that the application of the Fair Labor Standards Act to Roanoke Valley does not violate the establishment clause of the first amendment.

VI. Equal Protection

Shenandoah's final constitutional argument is that the application of the Fair Labor Standards Act to Roanoke Valley violates the equal protection guarantee implicit in the

¹⁷See also Alamo, 471 U.S. at 305 & n.31, distinguishing FLSA requirements from "the kind of government surveillance the Court has previously held to pose an intolerable risk of government entanglement with religion."

Shenandoah points to the 10-year history of this case and its requirements for producing records as proof of the entanglement problems arising from the FLSA. If Shenandoah's reasoning were followed to its logical conclusion, the government could never bring any claim against a religious organization without running afoul of the establishment clause. But "[e]ven religious schools cannot claim to be wholly free from some state regulation." Ohio Civil Rights Comm'n v. Dayton Schools, 477 U.S. 619, 628 (1986) (citing Yoder, 406 U.S. at 213).

fifth amendment. See Bolling v. Sharoe, 347 U.S. 497, 499 (1954). Again Shenandoah points to the ministerial exemption, arguing that it creates a suspect classification which invidiously discriminates against adherents of religions that do not have formal religious orders. As the Supreme Court observed in Prince v. Massachusetts, 321 U.S. 158, 170 (1944), this is but another phrasing of the first amendment arguments we have already considered. There is "no justification for applying strict scrutiny to a statute that passes the Lemon test. The proper inquiry is whether Congress has chosen a rational classification to further a legitimate end." Amos, 483 U.S. at 339.

Courts analyzing similar ministerial exemptions in an equal protection context have upheld the exemptions as a rational means of creating a buffer between church and state. See, e.g., Bethel Baptist Church v. United

States, 822 F.2d 1334, 1341-42 (3d Cir. 1987), cert. denied. 485 U.S. 959 (1988); Olsen v. Commissioner, 709 F.2d 278, 282-83 (4th Cir. 1983). The same reasoning applies here and we find no fifth amendment violation.

VII. Relief

Shenandoah and the government each challenge aspects of the remedy crafted by the district court in this case. Shenandoah argues that the court erred in calculating back pay on both the equal pay and minimum wage claims. The government contends that the trial court erred in refusing to award prejudgment interest and in denying injunctive relief. We find all of these contentions to be without merit.

The district court awarded \$177,680 to the government on behalf of female teachers on the equal pay claim. Shenandoah seeks to reduce this sum by arguing that the court should not have awarded damages for

supplements not paid to single female teachers. The Supreme Court has explained that in equal pay claims

once the [government] has carried [its] burden of showing that the employer pays workers of one sex more than workers of the opposite sex for equal work, the burden shifts to the employer to show that the differential is justified . . .

Corning Glass, 417 U.S. at 196. Shenandoah stipulated that women were paid less than men at Roanoke Valley.¹⁸ It bore the burden of

¹⁸The stipulation reveals the following:

School Year	Female Teacher Receiving Supplement/ Total Female Teachers	Male Teachers Receiving Supplement/ Total Male Teachers
1976-77	0/15	3/4
1977-78	0/16	4/5
1978-79	0/20	4/4
1979-80	0/25	4/4
1980-81	0/21	5/5
1981-82	1/19	7/7
1982-83	1/23	6/6
1983-84	2/23	6/6
1984-85	3/26	6/6
1985-86	1/24	5/5

This table includes only teachers who worked on a full-time basis.

proving that gender was not the reason for this discrepancy.

As its affirmative defense, Shenandoah urges that single female teachers were discriminated against on the basis of marital status, not sex. See 29 U.S.C. § 206(d)(1)(iv). It relies on the fact that the sole unmarried male teacher employed by Roanoke Valley was not paid a head-of-household supplement. Shenandoah asserts that single people of either sex were ineligible for the supplement. But the trial court also had before it evidence that marital status was not the determinative factor. Three years after the commencement of this action, Roanoke Valley deviated from its asserted policy and began paying supplements to some single people--divorced mothers with dependents. This conflicts with Shenandoah's assertion that only married people qualified for the supplement. In the group that Shenandoah

describes as eligible for the extra pay-- married people--it admitted discriminating against women by not making the supplement available to them on the same basis as to men.

The district court rejected Shenandoah's argument that it used marital status as the threshold consideration in determining eligibility for the head-of-household supplement, stating "[t]he court need not decide if Shenandoah could legally have paid a supplement to all married teachers while denying it to all single teachers performing the same work, for that is not the policy the church followed." Shenandoah II, 707 F. Supp. at 1464. In light of all the evidence, we cannot hold clearly erroneous the trial court's finding that Shenandoah failed to carry its burden of proving that the salary differential was "not based on a factor other than sex." See Brewster v. Barnes, 788 F.2d 985, 992 (4th Cir. 1986).

Shenandoah also complains of the district court's back pay award on the minimum wage claims. The district court awarded \$16,818.46. The parties had stipulated that amount as the difference in the wages the ninety-one affected support staff members actually received between 1976 and 1982 and what they would have received, had they been paid the minimum wage. Shenandoah urges the court erred in not considering whether the work of these support staff members was performed for the church or for the school. But Shenandoah also asserts that "some of the work is so interrelated . . . that it would be virtually impossible to assign an amount to either category." Shenandoah directs us to no evidence produced at trial that would provide a basis for distinguishing between church- and school-related labor. Given that the trial court was not provided with a sufficient evidentiary basis on which to make the

distinction Shenandoah seeks, the court did not err in awarding back pay based on the stipulation.

The government has cross-appealed, claiming that the district court erred in refusing to award prejudgment interest. Normally, "[p]rejudgment interest is necessary, in the absence of liquidated damages, to make the individual discriminatee whole." Cline v. Roadway Express, 689 F.2d 481, 489 (4th Cir. 1982). However, the decision whether to award interest is within the trial court's discretion. Id. On the narrow facts of this case, we find the equitable considerations sufficient to avoid a finding of abuse of discretion. Neither do we find that the district court abused its discretion in refusing to grant injunctive relief, in light of the fact that Roanoke Valley has been in compliance with the Act since 1986.

* * *

To summarize, we conclude that Congress affirmatively intended the Fair Labor Standards Act to apply to church-operated schools and that application of the Act to Roanoke Valley does not violate the first or fifth amendment rights of the church or the intervenors in this action. We affirm the district court award of \$16,818.46 back pay for support staff members who were subject to minimum wage violations and of \$177,680 back pay for teachers who were subject to equal pay violations. We also affirm the denial of prejudgment interest and injunctive relief.

AFFIRMED

PERTINENT TEXT OF STATUTORY AND
CONSTITUTIONAL PROVISIONS CITED IN
PART VI OF THE PETITION

(1) 29 U.S.C. § 206(a)

"(a) Every employer shall pay to each of his employees who in any work week is engaged in commerce or in the production of goods for commerce or is employed in an enterprise engaged in commerce or in the production of goods for commerce, wages, at the following rates:...."

(2) 29 U.S.C. § 206(b)

"(b) The employer shall pay to each of his employees (other than an employee to whom Subsection (a)(5) applies) who in any work week is engaged in commerce or in the production of goods for commerce, or is employed in an enterprise engaged in commerce or in the production of goods for commerce, and who in such work week is brought within the purview of this Section by the amendments made to this Act by the Fair Labor Standards Amendments of 1966 (29 U.S.C.S. §§ 203, 206, 207, 213, 214, 216, 218, 255), Title IX of the Education Amendments of 1972, where the Fair Labor Standards Amendments of 1974, wages at the following rates:...."

(3) 29 U.S.C. § 206(d)(1)

"(d)(1) No employer having employees subject to any provisions of this section shall discriminate, within any establishment in which such employees are employed, between employees on the basis

of sex by paying wages to employees in such establishment at a rate less than the rate at which he pays wages to employees of the opposite sex and such establishment for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions, except where such payment is made pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex; Provided, That an employer who is paying a wage rate differential in violation of this subsection shall not, in order to comply with the provisions of this Subsection, reduce the wage rate of any employee."

The First Amendment to the Constitution of the United States in pertinent part is as follows:

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof...."

(5) The Fourteenth Amendment of the United States Constitution in pertinent part relevant to the Equal Protection Clause is as follows:

"Section 1. Citizens of the United States.

All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and the state wherein they

reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

In the Supreme Court of the United States

OCTOBER TERM, 1990

SHENANDOAH BAPTIST CHURCH, PETITIONER

v.

ELIZABETH DOLE, SECRETARY OF LABOR, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Fair Labor Standards Act of 1938, 29 U.S.C. 201 *et seq.*, applies to petitioner's private school and the lay teachers petitioner employs.
2. Whether the Fair Labor Standards Act, as applied to petitioner's operation of its school, violates the First Amendment or the equal protection component of the Fifth Amendment.
3. Whether petitioner violated the equal pay provision of the Fair Labor Standards Act, 29 U.S.C. 206(d), by paying a "head-of-household" salary supplement to married male teachers.
4. Whether petitioner, for purposes of avoiding monetary relief under the Fair Labor Standards Act, had the burden of showing that underpaid employees' work was properly allocable to activities unrelated to its school.



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In the Supreme Court of the United States

OCTOBER TERM, 1990

No. 90-16

SHENANDOAH BAPTIST CHURCH, PETITIONER

v.

ELIZABETH DOLE, SECRETARY OF LABOR, ET AL.

*ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT*

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A46) is reported at 899 F.2d 1389. The opinions of the district court are reported at 707 F. Supp. 1450 and 573 F. Supp. 320.

JURISDICTION

The judgment of the court of appeals was entered on March 30, 1990. The petition for a writ of certiorari was filed on June 28, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner is an unincorporated religious association that operates the Roanoke Valley Christian School in Roanoke, Virginia, a preschool, elementary

(1)

and secondary school. The school, funded by tuition payments and donations, admits children of all religious faiths. Petitioner and its members view Christian education as a vital part of the church's religious mission. As a result, petitioner integrates biblical material into its teaching of academic subjects. Many of the school's teachers and employees considered their work to be a "personal ministry." 707 F. Supp. 1450, 1456 (W.D. Va. 1989). None of them, however, were "clergy in the sense of having been ordained, leading a congregation or performing such sacerdotal functions as baptisms or marriages." *Ibid.*; see *id.* at 1455; Pet. App. A3-A5, A20-A21; C.A. Supp. App. 61-62.¹

Petitioner stipulated that, during the years 1976 to 1982, it paid 91 persons hired as support personnel less than the hourly minimum wage mandated by the Fair Labor Standards Act of 1938, 29 U.S.C. 201 *et seq.* These employees included bus drivers, custodians, kitchen workers, bookkeepers, and secretaries. The total wage shortfall amounted to \$16,818.46. Some of these employees' work also benefitted petitioner's activities unrelated to its school. Pet. App. A7, A44.

From 1976 to 1986, petitioner paid a "head-of-household" salary supplement to all married male teachers, regardless of the individual's financial responsibilities for his family.² Petitioner did not pay

¹ As petitioner's pastor explained, Baptists distinguish between "persons who hold such clerical offices as pastor, deacon or bishop and the ministry of all believers." 707 F. Supp. at 1456.

² The amount of the supplement declined over that period from \$1600 in the 1976-1977 school year, when base salaries

any married female teacher such a supplement, even though at least three such teachers in fact were supporting their families.³ Between 1981 and 1986, however, petitioner paid the supplement to three divorced female teachers with dependents. Petitioner stipulated that if all female teachers had been eligible to receive the supplement, petitioner would have paid them an additional \$177,680 in total wages. Pet. App. A6-A7; 707 F. Supp. at 1455.

2. In 1978, as a result of petitioner's providing the "head-of-household" salary supplement only to male teachers and failing to pay minimum wages to covered employees, the Secretary of Labor filed this action against petitioner in the United States District Court for the Western District of Virginia.⁴ The Secretary alleged that petitioner's actions violated the minimum wage and equal pay provisions of the Fair Labor Standards Act, 29 U.S.C. 206(a) and

were \$6,000, to \$200 in the 1985-1986 school year, when base salaries had increased to about \$12,500. Pet. App. A6.

Petitioner paid the supplement in order to attract teachers for specialized subjects. Since "the Bible clearly teaches that the husband is the head of the house, head of the wife, head of the family," petitioner treated only married men as automatically entitled to the supplement. Pet. App. A6. Neither the Bible nor church doctrine, however, mandated that petitioner pay male and female teachers different salaries. *Id.* at A30.

³ For example, one female teacher was "rais[ing] two children on her teaching income after her husband, who had become disabled and mentally ill, left the family." Pet. App. A7.

⁴ In September 1979, the Equal Employment Opportunity Commission joined as plaintiff after it became responsible for enforcing the equal pay provision of the Act. Pet. App. A8 n.2.

(d), and therefore sought back pay and injunctive relief. Pet. App. A8.⁵

a. On the Secretary's motion for partial summary judgment, the district court held that petitioner had violated the minimum wage provision of the Fair Labor Standards Act, 29 U.S.C. 206(a). 573 F. Supp. 320 (W.D. Va. 1983). The court con-

⁵ The Fair Labor Standards Act applies to a covered "enterprise," which the Act defines as

the related activities performed (either through unified operation or common control) by any person or persons for a common business purpose, and includes all such activities whether performed in one or more establishments or by one or more corporate or other organizational units * * *. For purposes of this subsection, the activities performed by any person or persons—

(1) in connection with the operation of a hospital, * * *, a school for mentally or physically handicapped or gifted children, a preschool, elementary or secondary school, or an institution of higher education (regardless of whether or not such hospital, institution, or school is public or private or operated for profit or not for profit)
* * *

shall be deemed to be activities performed for a business purpose.

29 U.S.C. 203(r).

The Act further defines a covered "[e]nterprise engaged in commerce or in the production of goods for commerce" as an enterprise which has employees engaged in commerce
* * * and which

* * * * *

(5) is engaged in the operation of a hospital, * * *, a school for mentally or physically handicapped or gifted children, a preschool, elementary or secondary school, or an institution of higher education (regardless of whether or not such hospital, institution, or school is public or private or operated for profit or not for profit) * * *.

29 U.S.C. 203(s).

cluded that "Congress clearly intended the Act's minimum wage provisions to apply to church-operated schools," *id.* at 322 (citing 29 U.S.C. 203(s)(5)), and rejected petitioner's effort "to equate its lay, non-professional support personnel, such as bus drivers and cafeteria workers, with nuns, priests and others who are members of recognized 'religious orders'" exempt from the Act's coverage, 573 F. Supp. at 323. Finally, the court determined that the Act, as applied to petitioner's activities, did not violate the First Amendment. 573 F. Supp. at 324-327.⁶

b. In 1989, after holding a trial with an advisory jury, the district court also found petitioner liable for violating the equal pay provision of the Fair Labor Standards Act, 29 U.S.C. 206(d). 707 F. Supp. 1450 (W.D. Va. 1989). As an initial matter, the court "reaffirm[ed] its ruling that Congress clearly intended the Act to apply to church-operated schools." *Id.* at 1457 (citing *EEOC v. Fremont Christian School*, 781 F.2d 1362 (9th Cir. 1986) (29 U.S.C. 206(d) applied to a church-operated school)).⁷ Moreover, the court again concluded that the Act, as applied to petitioner's activities, did not violate the First Amendment. 707 F. Supp. at 1458-1462. Turning to the alleged violation, the court found that the

⁶ The court later ordered petitioner to pay those 91 employees the stipulated total back pay award of \$16,818.46. 707 F. Supp. at 1465.

⁷ The court recognized that "persons who function as clergy are exempt from the Act." 707 F. Supp. at 1462 n.12. Here, the court found, "the employees for whom the government [brought] this action did not function in their jobs at the school as clergy, and [petitioner did] not seriously argue that the ministerial exception should apply to them." *Ibid.*

“parties’ stipulations, together with the evidence, indicate that the head-of-household supplement [petitioner] paid between 1976 and 1986 was extended on the basis of sex.” *Id.* at 1458. The court accepted the jury’s finding “that the supplement was not based on a factor other than sex.” *Ibid.* Accordingly, the court ordered petitioner to pay to all female teachers who were denied the “head-of-household” supplement the salary differential, the stipulated total back pay award of \$177,630. *Id.* at 1464-1465.⁸

3. The court of appeals affirmed. Pet. App. A1-A46. The court first addressed petitioner’s contention that its school was not an “enterprise” covered by the Fair Labor Standards Act. The court found that the statute “explicitly states that nonprofit schools [such as petitioner’s] are within the scope of the Act.” *Id.* at A14 (citing 29 U.S.C. 203(r) and (s)(5)). And the court, after reviewing pertinent legislative history, rejected petitioner’s contention that the statutory language “does not demonstrate a clear ‘affirmative intention’ by Congress that the Act apply to church operated schools.” Pet. App. A15 (quoting *NLRB v. Catholic Bishop*, 440 U.S. 490, 501 (1979)). The court pointed to a floor debate showing that Congress “assumed that [a parochial elementary] school was an enterprise.” Pet. App. A17 (citing 112 Cong. Rec. 11,371 (1966)).⁹ Ac-

⁸ The court denied the government’s requests to award prejudgment interest and order injunctive relief. 707 F. Supp. at 1463-1465. The court of appeals affirmed those aspects of the district court’s judgment. Pet. App. A45. The government has not sought further review of those claims.

⁹ The court also noted that Congress, in 1977, amended the statute by creating an exemption for “religious or non-profit educational conference center[s].” 29 U.S.C. 213(a)(3).

cordingly, the court concluded that “the history of the statute demonstrates an affirmative intention by [Congress] to treat church-operated schools as enterprises.” Pet. App. A18.

Petitioner also contended the teachers it hired were not “employees” under the Act, but rather qualified as “ministers” falling within the so-called “ministerial exemption.”¹⁰ The court found that petitioner’s teachers “perform no sacerdotal functions [and do not] serve as church governors.” Pet. App. A25. The court further found that the teachers “belong to no clearly delineated religious order.” *Ibid.* “The economic reality,” the court determined, was that petitioner’s “teachers are employed as lay teachers in a church-operated private school.” *Id.* at A27. The court therefore held that petitioner’s teachers were “employees” under the Act.

Turning to petitioner’s scattershot constitutional challenge to the Act as applied to its activities, the court first considered petitioner’s claim under the Free Exercise Clause. The court determined that any

court concluded, “if church-operated educational facilities had been excluded under the statutory definition of enterprise.” Pet. App. A18.

¹⁰ As the court explained, the Secretary had issued the following administrative guideline setting forth that exemption:

Persons such as nuns, monks, priests, lay brothers, ministers, deacons and other members of religious orders who serve pursuant to their religious obligations in the schools . . . operated by their church or religious order shall not be considered to be “employees.”

Pet. App. A23 (quoting U.S. Dep’t of Labor, Wage and Hour Division, *Field Operations Handbook* § 10b03(b) (1967)).

burden on the exercise of petitioner's "sincerely-held religious beliefs" would be "limited." Pet. App. A28, A29. It noted that "[a]lthough [petitioner's] head-of-household pay supplement was grounded on a biblical passage, church members testified that the Bible does not mandate a pay differential based on sex." *Id.* at A30. The court further pointed out that "no [church] doctrine prevents [petitioner] from paying women as much as men or from paying the minimum wage," and that petitioner has fully complied with the Act since 1986. *Ibid.* On the other hand, the court concluded that the Act furthers governmental "interests of the highest order," *Wisconsin v. Yoder*, 406 U.S. 205, 215 (1972), namely, assuring workers a minimum standard of living and remedying gender-based pay discrimination in employment. Pet. App. A32-A33. In these circumstances, the court held, "the balance tips toward application of the [Act] to [petitioner]." *Id.* at A33.¹¹

Applying the three-part test set forth in *Lemon v. Kurtzman*, 403 U.S. 602, 612-613 (1971), the court rejected petitioner's Establishment Clause challenge. Contrary to petitioner's assertion, the court concluded that the "ministerial exemption" did not create an "official preference" for the Roman Catholic Church. Pet. App. A36. The court explained that that exemption was "facially neutral, encompassing ministers, deacons, and members of religious orders in any

¹¹ The court recognized that "[t]here is no principled way of exempting the school without exempting all other sectarian schools and thereby the thousands of lay teachers and staff members on their payrolls," a result that would "undermine the congressional goal of making minimum wage and equal pay requirements applicable to private as well as public schools." Pet. App. A33-A34.

faith, not exclusively Catholic nuns and priests.” *Ibid.* Moreover, that exemption was “based on a determination that members of the clergy should not be characterized as employees, not on a decision to prefer any specific religion.” *Ibid.* Such determinations, the court held, do not constitute violations of the Establishment Clause. *Id.* at A36-A37 (citing *Gillette v. United States*, 401 U.S. 437, 451-454 (1971)).¹²

The court next rejected petitioner’s contention that the Act violated the equal protection component of the Fifth Amendment by effectively “discriminat[ing] against adherents of religions that do not have formal religious orders.” Pet. App. A39. The court treated this argument as “but another phrasing of first amendment arguments [it had] already considered.” *Ibid.* (citing *Prince v. Massachusetts*, 321 U.S. 158, 170 (1944)). Following *Corporation of Presiding Bishop v. Amos*, 483 U.S. 327, 339 (1987), the court looked to whether “Congress has chosen a rational classification to further a legitimate end.” Pet. App. A39. Here, the “ministerial exemption” was a “rational means of creating a buffer between church and state.” *Ibid.*

Finally, the court of appeals rejected petitioner’s challenges to the relief ordered by the district court. Reviewing the record with respect to the award for violating the equal pay provision, the court upheld the district court’s “finding that [petitioner] failed

¹² The court disposed of petitioner’s claim that the Act “spawns impermissible government entanglement with religion” by noting that this Court had previously rejected an analogous contention in *Tony & Susan Alamo Foundation v. Secretary of Labor*, 471 U.S. 290, 305-306 (1985). Pet. App. A37-A38.

to carry its burden of proving that the salary differential was 'not based on a factor other than sex.'" Pet. App. A43 (quoting *Brewster v. Barnes*, 788 F.2d 985, 992 (4th Cir. 1986)). Petitioner also challenged the back pay award for violating the minimum wage provision, asserting that the district court "erred in not considering whether the work of these support staff members was performed for the church or for the school." Pet. App. A44. But the court of appeals found that petitioner pointed to "no evidence produced at trial that would provide a basis for distinguishing between church- and school-related labor." *Ibid.* In these circumstances, the court held, the trial court "did not err in awarding back pay based on the stipulation [between petitioner and the government]." *Id.* at A45.

ARGUMENT

1. Petitioner first contends (Pet. 17-22) that its school was not an "enterprise" covered by the Fair Labor Standards Act. The language of the statute forecloses that argument. By its terms, the Act defines a covered "enterprise" as including "a preschool, elementary or secondary school, or an institution of higher education (regardless of whether or not such * * * school is public or private or operated for profit or not for profit)." 29 U.S.C. 203(r)(1); see 29 U.S.C. 203(s)(5). Petitioner's school falls squarely within that straightforward definition. See, e.g., *EEOC v. Fremont Christian School*, 781 F.2d 1362 (9th Cir. 1986); cf. *Tony & Susan Alamo Foundation v. Secretary of Labor*, 471 U.S. 290 (1985) (holding that the foundation was an "enterprise" under the Act despite its status as a tax-exempt non-profit religious organization). Indeed, this Court has

long referred to church-affiliated schools as “private schools,” see, e.g., *Bob Jones University v. United States*, 461 U.S. 574, 577-579 (1983); *NLRB v. Catholic Bishop*, 440 U.S. 490, 497 (1979); *Pierce v. Society of Sisters*, 268 U.S. 510, 534 (1925), a practice that comports with the common understanding of that term, see, e.g., *Black’s Law Dictionary* 1206-1207 (5th ed. 1979);¹³ U.S. Dep’t of Education, *Digest of Education Statistics* 64-67 (25th ed. 1989) (classifying religiously affiliated schools as a type of “private school”).¹⁴

Petitioner next contends (Pet. 22-29) that the teachers it hired were not “employees” under the Act, but rather qualified as exempt “ministers.” The exemption petitioner invokes provides that

[p]ersons such as nuns, monks, priests, lay brothers, ministers, deacons and other members of religious orders who serve pursuant to their religious obligations in the schools . . . operated by their church or religious order shall not be considered to be “employees.”

Pet. App. A23 (quoting U.S. Dep’t of Labor, Wage and Hour Division, *Field Operations Handbook* § 10b03(b) (1967)). By its terms, that exemption does not extend to lay teachers at a church-operated

¹³ That source defines a “private school” as

[o]ne maintained by private individuals or corporations, not at public expense, and open only to pupils selected and admitted by the proprietors or governors, or to pupils of a certain class or possessing certain qualifications (racial, religious, or otherwise), and generally supported, in part at least, by tuition fees or charges.

Black’s Law Dictionary 1206-1207 (5th ed. 1979).

¹⁴ For these reasons, petitioner mistakenly relies (Pet. 18-22) on *NLRB v. Catholic Bishop*, 440 U.S. 490 (1979).

school—the sort of employees at issue here. Moreover, that exemption, which stemmed from Congress's concerns that members of religious orders—not lay employees—be excluded from the Act's coverage, see, e.g., 112 Cong. Rec. 11,371 (1966), has never been accorded a broader reach. Cf. *Rayburn v. General Conference of Seventh-Day Adventists*, 772 F.2d 1164, 1169 (4th Cir. 1985) (applying “ministerial exemption” to Title VII), cert. denied, 478 U.S. 1020 (1986).¹⁵

2. a. Petitioner also argues (Pet. 29-33) that the “ministerial exemption” to the Fair Labor Standards Act, as applied to its activities, violates the equal protection component of the Fifth Amendment. That contention is groundless. The limited ministerial exemption to the Fair Labor Standards Act, like the statutory exemption at issue in *Corporation of Presiding Bishop v. Amos*, 483 U.S. 327 (1987) (Section 702 of the Civil Rights Act of 1964, 42 U.S.C. 2000e-1), “is neutral on its face and motivated by a permissible purpose of limiting governmental interference with the exercise of religion.” 483 U.S. at 339. Accordingly, “[t]he proper inquiry is whether Congress has chosen a rational classification to further a legitimate end.” *Ibid.* Here, as the court

¹⁵ Petitioner asserts (Pet. 24-26) that the decision below conflicts with *EEOC v. Southwestern Baptist Theological Seminary*, 651 F.2d 277 (5th Cir. 1981), cert. denied, 456 U.S. 905 (1982), and *McClure v. Salvation Army*, 460 F.2d 553 (5th Cir.), cert. denied, 409 U.S. 896 (1972). That assertion is mistaken since those decisions involved the “ministerial exemption” to Title VII, not the Fair Labor Standards Act. In any event, those decisions involved ordained ministers—individuals who fell within the terms of that exemption. Here, by contrast, the employees at issue fall outside the scope of the FLSA exemption.

of appeals recognized, the "ministerial exemption" was a "rational means of creating a buffer between church and state." Pet. App. A39.

b. Petitioner argues (Pet. 33-40) that the Act, as applied to its activities, violates the Free Exercise Clause. In *Employment Division, Department of Human Resources v. Smith*, 110 S. Ct. 1595 (1990), this Court held that

the right of free exercise does not relieve an individual of the obligation to comply with a valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes).

Id. at 1600 (internal quotation marks and citation omitted). The Fair Labor Standards Act falls comfortably within that category of laws and thus, as applied here, does not violate the First Amendment. Indeed, as the Court concluded in *Smith*, "if prohibiting the exercise of religion * * * is not the object of the [law] but merely the incidental effect of a generally applicable and otherwise valid provision, the First Amendment has not been offended." 110 S. Ct. at 1600.

Moreover, even assuming the more rigorous standard of review articulated in cases such as *Wisconsin v. Yoder*, 406 U.S. 205 (1972), and *Sherbert v. Verner*, 374 U.S. 398 (1963), remains applicable, petitioner's constitutional claim still falters. As this Court has remarked, "[i]t is virtually self-evident that the Free Exercise Clause does not require an exemption from a governmental program unless, at a minimum, inclusion in the program actually burdens the claimant's freedom to exercise religious rights." *Tony & Susan Alamo Foundation v. Secre-*

tary of Labor, 471 U.S. at 303. Here, the Act imposed an insubstantial burden on petitioner's free exercise of religion since, as the court of appeals found, "no [church] doctrine prevents [petitioner] from paying women as much as men or from paying the minimum wage." Pet. App. A30.

As opposed to this "limited burden," Pet. App. A29, the minimum wage and equal pay provisions of the Act serve compelling government interests, *i.e.*, providing a minimum standard of living and eliminating pay discrimination between men and women. See, *e.g.*, *Corning Glass Works v. Brennan*, 417 U.S. 188, 195 (1974); *Mitchell v. Pilgrim Holiness Church Corp.*, 210 F.2d 879, 884 (7th Cir.), cert. denied, 347 U.S. 1013 (1954). In these circumstances, the court of appeals correctly held that "the balance tips toward application of the [Act] to [petitioner]," particularly where, as here, "[t]here is no principled way of exempting the school without exempting all other sectarian schools and thereby the thousands of lay teachers and staff members on their payrolls," a result that would "undermine the congressional goal of making minimum wage and equal pay requirements applicable to private as well as public schools." Pet. App. A33-A34.

c. Petitioner also renews its contention (Pet. 40-42) that the Fair Labor Standards Act, as applied here, violates the Establishment Clause. First, this Court's decision in *Tony & Susan Alamo Foundation v. Secretary of Labor*, 471 U.S. 290 (1985), forecloses petitioner's assertion of excessive "entanglement." There, the Court held that "routine and factual inquiries" concerning the Act's recordkeeping requirements "bear no resemblance to the kind of government surveillance the Court has previously held to pose an intolerable risk of government en-

tanglement with religion.” 471 U.S. at 305. Second, the “ministerial exemption” is not the sort of denominational preference anathema to the First Amendment. Cf. *Larson v. Valente*, 456 U.S. 228 (1982). Here, the exemption is neutral on its face and includes clergy of all faiths. See Pet. App. A36. Moreover, as the court of appeals recognized, that exemption was “based on a determination that members of the clergy should not be characterized as employees, not on a decision to prefer any specific religion.” *Ibid.*; see, e.g., *Gillette v. United States*, 401 U.S. 437, 451-454 (1971).

3. Petitioner argues that it did not violate the equal pay provision of the Fair Labor Standards Act, 29 U.S.C. 206(d), by paying a “head-of-household” salary supplement to married male teachers, asserting that its policy “clearly was based on marital status.” Pet. 43. The district court determined, however, based on the jury’s finding of fact, “that the head-of-household supplement [petitioner] paid between 1976 and 1986 was extended on the basis of sex,” not on the basis of marital or any other status. 707 F. Supp. at 1458. And the court of appeals expressly upheld that finding, concluding “that the salary differential was ‘not based on a factor other than sex.’” Pet. App. A43 (quoting *Brewster v. Barnes*, 788 F.2d 985, 992 (4th Cir. 1986)). Petitioner offers no persuasive reason for this Court to depart from its practice of declining to review factual findings concurred in by both lower courts. See, e.g., *Tiffany Fine Arts, Inc. v. United States*, 469 U.S. 310, 318 n.5 (1985); *United States v. Reliable Transfer Co.*, 421 U.S. 397, 401 n.2 (1975).¹⁶

¹⁶ Since the record shows that petitioner awarded its supplement on the basis of sex, not marital status, petitioner errs

4. Finally, petitioner contends (Pet. 45-47) that the district court erred in requiring it to show that underpaid employees' work was properly allocable to activities unrelated to its school. Petitioner stipulated that, during the years 1976 to 1982, it paid 91 persons hired as support personnel "[i]n the operation of [its] [s]chool" less than the hourly minimum wage mandated by the Act, C.A. Supp. App. 228, that these employees included bus drivers, custodians, kitchen workers, bookkeepers, and secretaries, and that the total wage shortfall amounted to \$16,818.46. Pet. App. A7; C.A. Supp. App. 230-234. Petitioner, however, made no attempt to offer any "evidence * * * that would provide a basis for distinguishing between church- and school-related labor." Pet. App. A44. In these circumstances, the district court's awarding relief on the basis of petitioner's stipulation is unexceptionable.

in suggesting (Pet. 43-44) that the court of appeals' decision conflicts with decisions upholding policies which treated all married persons alike. Petitioner's policy explicitly distinguished between married men and women.

Petitioner also asserts that the courts below erred in awarding relief to unmarried female teachers without dependents, because its "supplement was never considered applicable to any class except those with dependents, that is, married or formerly married." Pet. 44. That assertion is misleading. The record shows that one group of teachers received the supplement regardless of whether they had dependents—married men. In the court of appeals, petitioner tried to explain away the issue of gender neutrality by stating that "the answer * * * is self-evident—if [the male teacher was] married, the wife was a dependent." Pet. C.A. Reply Br. 22. Such a presumption, however, is scarcely gender-neutral, and thus is not a "factor other than sex."

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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